

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

WALTER BARTLETT,

No C 05-03568 VRW

Plaintiff,

ORDER

v

MICHAEL J ASTRUE, Commissioner of
Social Security,

Defendant.

Plaintiff Walter Bartlett brings this action under 42 USC section 405(g), challenging the final decision of the Social Security Administration (SSA) denying him disability insurance benefits (DIB) from June 23, 1998 through September 30, 2001. Plaintiff claims disability based on a lower back condition. The court now considers cross-motions for summary judgment. Pl Mot (Doc #9); Def Mot (Doc #10). Because the court concludes that plaintiff did not overcome the presumption of non-disability that resulted from a previous final decision by the SSA, the court DENIES plaintiff's motion and GRANTS defendant's motion.

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I

Plaintiff was born on July 25, 1952 and is a high school graduate. Administrative Record (AR), Doc #8 at 453, 484. He worked for eleven years as a basement attendant, crane operator and tractor driver at a steel mill before suffering a lower back injury on the job in May 1985. AR 37, 479. As a result, plaintiff experienced lower back and leg pain. AR 69. On January 21, 1987 he filed for DIB under Title II of the Social Security Act (Act). Id. Plaintiff was diagnosed with lumbar spinal stenosis with a ruptured disc and nerve root damage. AR 229-33. An Administrative Law Judge (ALJ) found plaintiff "disabled" within the meaning of the Act because his impairment prevented him from "[performing] basic work activities at any exertional level." Id.

Dr Kenneth Light, an orthopedic surgeon, treated plaintiff beginning in September 1992. AR 314-58. On April 20, 1993, Dr Light performed spinal fusion surgery and repair of the pelvis using a graft of plaintiff's thigh bone. AR 349. Plaintiff improved initially, but fusion of the spine remained incomplete and there was breakage of one of the small rods placed to align his spine. AR 328. Dr Light performed another surgery to repair the fusion and reinsert rods and screws on December 6, 1994. Id.

A year following the last surgery, Dr Light noted that x-rays showed a healed spine and solid fusion, and that "[plaintiff] walks on a regular basis * * * [without] relief [from] pain medication to date." AR 321. Plaintiff continued to complain

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1 of pain and intermittent collapsing of his right leg, but on March
2 13, 1996 Dr Light wrote:

3 there is no patient who has reconstruction of
4 the spine and is perfectly asymptomatic. * * *
5 This man is willing to return to work at the
6 steel mill in a job that does not require heavy
7 bending and lifting. I think his spine is
8 strong enough to accept this level of physical
9 activity. * * * He would not be able to lift
10 more than 30 lbs and should avoid frequent
11 bending. Other than that, I think he is capable
12 of driving a variety of vehicles at the mill and
13 should be capable of returning to work in some
14 capacity.

15 AR 314.

16 Dr Light's conclusion prompted the SSA to issue a
17 Continuing Disability Review decision to discontinue plaintiff's
18 disability insurance because his condition had improved and because
19 based on his age, education and past work experience, he could
20 perform light work. AR 245-47. Plaintiff requested
21 reconsideration which included a hearing before a disability
22 hearing officer. AR 248. After taking testimony and receiving
23 medical records, the hearing officer found that plaintiff's
24 condition did not meet any listing in the Listing of Impairments in
25 the Social Security regulations and that plaintiff was able to
26 perform light work not requiring frequent stooping and crouching.
27 AR 260-66.

28 Plaintiff requested a hearing before an ALJ which took
29 place on March 19, 1998. AR 26-68, 272. At the ALJ's directive,
30 plaintiff saw orthopedic surgeon Dr Lisa Sandusky on April 18, 1998
31 for a consulting evaluation. AR 65, 374-76. Although plaintiff
32 described "some right lower extremity weakness," Dr Sandusky
33 determined, inter alia, that plaintiff could "stand for [up to] 2

1 hours at a time without a break"; "walk on an occasional basis at
2 work"; "sit up to 4 hours without a break"; "lift, pull and push up
3 to 40 lbs on an occasional basis and may lift, pull and push 25 lbs
4 on a frequent basis"; and that "[he has] no limitations on tasks
5 that require fine motor skills." Id.

6 On June 29, 1998, the ALJ issued a decision stating that
7 plaintiff's condition had improved and that he could engage in
8 substantial gainful activity. AR 11-24. The SSA Appeals Council
9 denied review. AR 5-6. Plaintiff then sought judicial review in
10 the United States district court for the Northern District of
11 California. Bartlett v Barnhart, #C 00-02541 MJJ. On February 13,
12 2002, the court upheld the ALJ's decision. AR 420. Plaintiff did
13 not appeal that decision to the court of appeals.

14 On March 22, 2002, plaintiff applied for another period
15 of DIB ending September 30, 2001, his date last insured. AR 453-
16 57. Plaintiff initially alleged disability beginning on May 29,
17 1985, but later amended his alleged onset date to June 23, 1998.
18 Id. Plaintiff added knee pain as an impairment because he
19 underwent right knee surgery in December 2000 to treat a staph
20 infection. AR 453-57, 602-04. The SSA denied plaintiff's request
21 on May 29, 2002 and again on September 10, 2002. AR 437-40, 442-
22 45.

23 Plaintiff then timely requested a hearing before an ALJ
24 which took place on August 21, 2003. The ALJ took testimony from
25 plaintiff and from vocational expert (VE) John Velton. AR 446,
26 712-98. At the hearing, plaintiff testified to the medical
27 treatment and medication he received. In an attempt to explain the
28 sparse medical evidence showing he was taking pain medication,

1 plaintiff testified that his brother-in-law, allegedly a doctor,
2 gave him medication. AR 748-49. He described his life as "boring"
3 and testified that he "hurts so bad [he] can't do anything" with
4 his days except eat and prepare meals and watch television. AR
5 768-80.

6 The VE determined that jobs existed in significant
7 numbers in the national economy that plaintiff could perform
8 consistent with his medically determinable impairments, functional
9 limitations, age, education and work experience. AR 394-95. Based
10 on plaintiff's testimony and the hypothetical limitations provided
11 by the ALJ, the VE testified to several jobs plaintiff could
12 perform. AR 786-88. Specifically, with plaintiff's ability to
13 perform only light work with alternate sitting and standing, and
14 without frequent bending or stooping, the VE responded with three
15 possible vocations with the sit/stand at will option required by
16 plaintiff's condition: (1) cashier II, of which there were 130,000
17 nationally and 3,000 locally; (2) survey worker, with 22,000
18 nationally and 500 locally; and (3) gate guard, with 36,000
19 nationally and 800 locally. AR 394, 786-88.

20 On October 30, 2003, the ALJ issued an eight-page ruling
21 concluding that plaintiff had not demonstrated "changed
22 circumstances" arising during the period from June 23, 1998 (the
23 date of the first ALJ's decision) through September 30, 2001, the
24 date plaintiff was last eligible for disability benefits under
25 Title II. AR 389-96. The ALJ noted that the denial of benefits
26 through June 23, 1998 was binding and the judgment entered against
27 plaintiff in the district court barred consideration of claims of
28 disability prior to that date and created "an ongoing presumption

1 that [plaintiff] was able to work beyond the date of that
2 decision." AR 391. To warrant a new finding of disability, the
3 ALJ explained, plaintiff had the burden of showing that his
4 condition had deteriorated from June 23, 1998 forward. Id.

5 Specifically, the ALJ concluded that although plaintiff
6 suffered from "severe" medically determinable impairments
7 (degenerative disc disease of the lumbar spine status post back
8 surgery and status post staphylococcus aureus infection in the
9 right knee), these did not meet or equal a listing in the Listing
10 of Impairments found at 20 CFR Part 404, Subpart P, Appendix 1,
11 because plaintiff's medical records did not "describe limitation of
12 motion in the spine with motor loss and sensory or reflex loss, as
13 required by [listing 1.04]." Id. The ALJ also found no evidence
14 in plaintiff's medical records of an inability to ambulate
15 effectively as required by listing 1.02 and concluded that "the
16 medical findings * * * [were] not equal in severity and duration to
17 any Listed findings." AR 392.

18 The ALJ underscored the fact that plaintiff sought
19 minimal medical treatment for his back pain during the relevant
20 time period. Id. He noted that plaintiff's fourth back surgery in
21 March 2003, occurred nearly eighteen months after the last date of
22 Title II eligibility and plaintiff had sought no medical treatment
23 regarding his spine between February 1999 and October 2002. AR
24 393. The ALJ deemed significant that although a computed
25 tomography (CT) scan in February 1999 showed spinal stenosis and
26 some degeneration of the L3-4 disc, it also showed that the fusion
27 at L4-S1 was solid and neurological reports showed plaintiff's

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1 neurological status as normal and unchanged since August 1998. AR
2 392.

3 Furthermore, to the extent that plaintiff was alleging he
4 could not perform light work, the ALJ rejected plaintiff's alleged
5 subjective disabling symptoms because of, inter alia: (1) the
6 minimal amount of treatment received for his back and knee
7 conditions between February 1999 and October 2002; (2) his ability
8 to do work around the house and to hunt and fish on occasion; (3)
9 his participation in 4-H club meetings; (4) his ability to drive
10 short distances; and (5) the lack of evidence showing he was taking
11 pain medication. AR 393, 792. The ALJ also noted inconsistencies
12 in the record regarding plaintiff's knee condition. AR 392.
13 Plaintiff initially reported to the emergency room physician that
14 he did not recall a "precipitating traumatic event" giving rise to
15 his knee swelling, but later stated that his injury was due to a
16 fall. Id. In fact, laboratory testing showed that the swelling
17 and pain in his knee stemmed from a staph infection. Id. X-rays
18 and a physical examination showed only "minimal degenerative
19 changes" and "unimpaired functioning in the legs with no
20 neurological deficits" and after a procedure in December 2000 to
21 remove the infection, plaintiff received no additional treatment
22 for his knee. Id. Consequently, the ALJ found plaintiff's
23 residual functional capacity (RFC) unchanged since the prior final
24 decision. AR 395.

25 Accordingly, the ALJ concluded that plaintiff's condition
26 had not substantially deteriorated so as to prevent him from
27 working for any twelve-month period during the period June 23, 1998
28 through September 30, 2001. AR 392. The SSA's Appeals Council

1 denied plaintiff's request for review, making the ALJ's decision
2 final. AR 380-83. On September 6, 2005, plaintiff commenced the
3 instant action for judicial review of the final decision.

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5 II

6 The court's jurisdiction is limited to determining
7 whether the SSA's denial of benefits is supported by substantial
8 evidence in the administrative record. 42 USC § 405(g). A
9 district court may overturn a decision to deny benefits only if the
10 decision is not supported by substantial evidence or is based on
11 legal error. Thomas v Barnhart, 278 F3d 947, 954 (9th Cir 2002).
12 Substantial evidence is more than a scintilla but less than a
13 preponderance; it is such relevant evidence as a reasonable mind
14 might accept as adequate to support a conclusion. Id. The ALJ's
15 decision must be upheld where it is free of legal error, even if
16 the evidence is susceptible to more than one rational
17 interpretation. Id. The court reviews the administrative record
18 as a whole. Andrews v Shalala, 53 F3d 1035, 1039 (9th Cir 1995).
19 Determinations of credibility, resolution of conflicts in medical
20 testimony and all other ambiguities are to be resolved by the ALJ.
21 Id.

22 To be eligible for SSA disability benefits, plaintiff
23 must demonstrate that he was "unable to do any substantial gainful
24 activity by reason of any medically determinable physical or mental
25 impairment which can be expected to result in death or which has
26 lasted or can be expected to last for a continuous period of not
27 less than 12 months." 20 CFR § 404.1527.

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1 To determine whether a claimant is disabled and entitled
2 to benefits, the SSA conducts a five-step sequential inquiry. 20
3 CFR § 404.1520. Under the first step, the ALJ considers whether
4 the claimant is currently employed in substantial gainful activity.
5 If not, the second step examines whether the claimant has a "severe
6 impairment" that significantly affects his or her ability to
7 conduct basic work activities. In step three, the ALJ determines
8 whether the claimant has a condition which meets or equals the
9 conditions outlined in the Listing of Impairments in 20 CFR Part
10 404, Subpart P, Appendix 1, and if so, the claimant is presumed
11 disabled. 20 CFR § 404.1520. If the claimant does not have such a
12 condition, step four asks whether the claimant can perform his past
13 relevant work. If not, in step five, the ALJ considers whether the
14 claimant has the ability to perform other work which exists in
15 substantial numbers in the national economy. 20 CFR §§
16 404.1520(b)-(f); §§ 404.920(b)-(f).

17 The claimant bears the burden of proof at steps one
18 through four. Bustamante v Massanari, 262 F3d 949, 953-54 (9th Cir
19 2001). At step five, the burden of proof shifts to the SSA to show
20 there are jobs in the national economy that the claimant is capable
21 of performing. *Id.* When there has been a denial of disability
22 benefits in a prior final decision, there is a presumption of non-
23 disability in subsequent proceedings. See Miller v Heckler, 770
24 F2d 845, 848 (9th Cir 1985). Accordingly, the burden continues to
25 be on the claimant who must make a showing of "changed
26 circumstances" since the date of the prior final decision. See
27 Booz v Secretary of Health and Human Services, 734 F2d 1378, 1379
28 (9th Cir 1983).

Pursuant to 42 USC § 405(h), the findings and decision of the SSA after a hearing shall be binding upon all individuals who were parties to such a hearing. Under 42 USC § 405(g), a claimant can request judicial review of a decision by the SSA and the judgment of a United States district court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions.

III

In support of his motion, plaintiff contends that: (1) substantial evidence does not support the ALJ's conclusion that plaintiff's alleged impairments did not meet or equal any listings in the Listing of Impairments; (2) the ALJ did not fully and fairly develop the record; (3) substantial evidence does not support the ALJ's evaluation of plaintiff's subjective reports of disabling symptoms; (4) the ALJ improperly failed to consider lay witness testimony; and (5) the ALJ improperly determined that plaintiff could perform other work. The court addresses each of these contentions in turn. The court, however, notes that a consistent motif in plaintiff's briefs is his attempt to introduce medical evidence from before 1998. The court disregards this irrelevant evidence and accompanying arguments because plaintiff did not appeal the district court's adverse judgment in Bartlett v Apfel, #C 00-2541 MJJ, affirming the ALJ's June 23, 1998 decision denying disability benefits to plaintiff and therefore creating a presumption of non-disability from that date through September 30, 2001, plaintiff's date last insured.

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A

Plaintiff contends that substantial evidence does not support the ALJ's conclusion that plaintiff's impairments do not meet or equal various musculoskeletal listings in the Listing of Impairments as set forth at 20 CFR Pt 404, Subpt P, App 1. Doc #9 at 6; Doc #13 at 2. The court disagrees.

To establish presumptive disability under the Listing at step three of the sequential evaluation process, a claimant must prove that his impairment (or combination of impairments) satisfies all of the medical criteria. See Sullivan v Zebley, 493 US 521, 530 (1990); see also Tackett v Apfel, 180 F3d 1094, 1099 (9th Cir 1999). "An impairment that manifests only some of those criteria, no matter how severely, does not qualify." Sullivan, 493 US at 530. In order to "meet" a listed impairment the claimant must establish each characteristic listed, while to "equal" a listed impairment the claimant must establish symptoms, signs and laboratory findings at least equal in severity and duration to the characteristics of a relevant listed impairment. See 20 CFR § 404.1526; Tackett, 180 F3d at 1099. Equivalence must be based on medical findings that are supported by medically acceptable clinical and laboratory diagnostic techniques. See CFR § 404.1526(b); Tackett, 180 F3d at 1100. The ALJ must review a claimant's symptoms and make specific findings essential to a conclusion of an impairment not meeting or equaling a listing. See Gonzalez v Sullivan, 914 F2d 1197, 1200 (9th Cir 1990). If there is an adequate basis from which to draw such a conclusion, the ALJ is not required to "state why a claimant failed to satisfy every different section of the listing of impairments." See id at 1201.

1 In order to meet Listing 1.04 (disorders of the spine), a
2 claimant must demonstrate:

3 (A) Evidence of nerve root compression characterized
4 by neuro-anatomic distribution of pain, limitation
5 of motion of the spine, motor loss (atrophy
6 associated muscle weakness or muscle weakness)
7 accompanied by sensory or reflex loss and, if there
8 is involvement of the lower back, positive straight-
9 leg raising test (sitting and supine); or

10 (B) Spinal arachnoiditis, confirmed by an operative
11 note or pathology report of tissue biopsy, or by
12 appropriate medically acceptable imaging, manifested
13 by severe burning or painful dysesthesia, resulting
14 in the need for changes in position or posture more
15 than once every 2 hours; or

16 (C) Lumbar spinal stenosis resulting in
17 pseudoclaudication, established by findings on
18 appropriate medically acceptable imaging, manifested
19 by chronic nonradicular pain and weakness, and
20 resulting in inability to ambulate effectively
21 * * *.

22 20 CFR Pt 404, Subpt P, App 1, § 1.04.

23 Plaintiff maintains that "the record is clear that [he]
24 has established all aspects of this listing." Doc #13 at 3. In
25 support of this contention, however, plaintiff cites evidence
26 reviewed and rejected by the court in Bartlett v Apfel, #C 00-02541
27 MJJ, as well as evidence of medical treatment sought after his last
28 date insured. Both types of evidence are irrelevant to the time
period at issue on this appeal. Doc #9 at 6-7. The scant evidence
plaintiff cites that does involve the period at issue is not
relevant to his spinal condition or consists of his own reports of
disabling pain symptoms which cannot be used to establish a listed
impairment. Id; AR 36-79, 504-27, 598-600, 606, 608, 610. General
assertions of functional disability are not enough to establish
disability at step three. Tackett, 180 F3d at 1100.

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1 Contrary to plaintiff's assertion, the record contains
2 substantial evidence from which the ALJ could conclude that
3 plaintiff did not satisfy listing 1.04. The ALJ documented the
4 absence of evidence of limitation of motion in the spine combined
5 with motor loss and sensory or reflex loss and/or of inability to
6 ambulate effectively. AR 391-92. The Listing of Impairments
7 defines "ineffective ambulation" as "having insufficient lower
8 extremity functioning to permit independent ambulation without the
9 use of a hand-held assistive device." 20 CFR Pt 404, Subpt P, App
10 1, § 1.00B2b. There is no evidence in the record that plaintiff
11 required the use of a hand-held assistive device. Moreover,
12 plaintiff sought no treatment for his spine between February 17,
13 1999 and his date last insured. AR 474, 593-600, 606, 648-49.

14 Even though plaintiff is represented by counsel,
15 plaintiff's briefs demonstrate significant confusion regarding
16 basic social security law concepts. For example, plaintiff asserts
17 - not once but several times - that the ALJ contradicted himself
18 and committed legal error by finding that plaintiff had a "severe
19 impairment" at step two, then denying plaintiff disability benefits
20 at step three. Doc #9 at 8-9. Satisfying step two, however, is
21 merely a prerequisite for the inquiry to proceed to step three;
22 "disability" within the meaning of the SSA can never be found
23 before step three. See 20 CFR § 404.1520. Many claimants found to
24 have "severe" impairments at step two are nonetheless unable to
25 establish disability in subsequent steps.

26 Next, plaintiff cites Young v Sullivan, 911 F2d 180 (9th
27 Cir 1990) and Orteza v Shalala, 50 F3d 748 (9th Cir 1995), perhaps
28 thinking they somehow support his position. In doing so, plaintiff

1 makes critical mistakes of fact and law. Doc #9 at 6-7. Plaintiff
2 seems to argue that he should have been found disabled because the
3 impairments the claimants suffered from in Young and Orteza, both
4 of which were found insufficient to support an award of benefits,
5 were less severe than his. They could do household chores and
6 drive, while plaintiff purportedly could not. Id.

7 The court does not follow plaintiff's logic in citing
8 Young and Orteza. The claimants in those cases suffered from
9 different impairments and set forth different arguments from
10 plaintiff and were ultimately denied benefits. Moreover, these
11 cases stand for little more than the bedrock principle of social
12 security benefits law that an ALJ's determination need only be
13 supported by substantial evidence to be upheld on judicial review.
14 Even the factual comparison plaintiff makes between his case and
15 Young and Orteza does not support his argument; ironically, the
16 evidence before the court shows that plaintiff engaged in a wide
17 range of similar activities, including household chores, walking,
18 driving and even fishing and hunting on occasion. AR 514-17.

19 Defendant notes that while plaintiff alleges that he
20 meets or equals listing 1.04, and purports to quote from that
21 listing at length, the language he quotes is actually from an
22 abrogated listing, 1.05C, which no longer exists. Doc #10 at 4.
23 This listing, which concerned spinal conditions, was removed from
24 the Listing of Impairments in 2002. Doc #10 at 4. After defendant
25 pointed this out, plaintiff responded that his spinal disorder
26 meets or equals listing 1.05C and asserts - without citing legal
27 authority - that defendant "must follow the listings of impairments
28 as they were when [plaintiff's] impairment began * * *." Doc #13

1 at 3. The court has found no legal authority supporting
2 plaintiff's argument. Moreover, even if listing 1.05C were still
3 part of the Listing of Impairments, the record plainly indicates
4 that plaintiff did not satisfy 1.05C when plaintiff received a
5 favorable decision in 1988 or when the court denied his claim in
6 Bartlett v Apfel, #C 00-02541 MJJ. AR 229-34, 422-32.

7 Plaintiff also baldly asserts that his knee impairment
8 meets or equals listings 1.02 or 1.03. Doc #9 at 6. But nowhere
9 in the record is there evidence that the incision in plaintiff's
10 right knee in December of 2000 prevented him from ambulating
11 effectively for a continuous period of 12 months. In fact, as
12 defendant correctly points out, "plaintiff has not articulated any
13 facts to support these assertions." Doc #10 at 4. Accordingly,
14 substantial evidence supported the ALJ's conclusion that plaintiff
15 did not meet or equal a listing in the Listing of Impairments.

16
17 B

18 Plaintiff contends that the ALJ did not fully and fairly
19 develop the record, but offers no details of this alleged lapse.
20 See Doc #9 at 7. Given that plaintiff's brief is peppered with
21 record citations from time periods and medical conditions not at
22 issue on this appeal, the court surmises that plaintiff intends to
23 challenge the ALJ's omission of this irrelevant evidence.

24 It would, of course, be error for the ALJ to decline to
25 consider evidence relating to plaintiff's date of disability onset
26 merely because that evidence dated from after plaintiff's date last
27 insured. Lester v Chater, 81 F3d 821, 832 (9th Cir 1995); see also
28 Smith v Bowen, 849 F2d 1222, 1225 (9th Cir 1988). After all, "[i]t

1 is obvious that medical reports are inevitably rendered
2 retrospectively * * *." Smith, 849 F2d at 1225. The court also
3 recognizes, however, that any "deterioration in [plaintiff's]
4 condition subsequent to [his date last insured] is, of course,
5 irrelevant." Waters v Gardner, 452 F2d 855, 858 (9th Cir 1971).
6 Likewise, evidence based on observations and medical reports made
7 prior to a previous final decision to deny benefits is also
8 irrelevant. See Miller v Heckler, 770 F2d 845, 848 (9th Cir 1985).

9 Plaintiff's alleged disability onset date is June 23,
10 1998, the date of the SSA's original decision denying him
11 disability benefits. Plaintiff's date last insured was September
12 30, 2001. AR 629. The ALJ noted that although plaintiff
13 experienced some back pain in August 1998, X-rays showed solid
14 fusion in the lower back. AR 651. In February 1999, tests
15 revealed spinal stenosis and narrowing of the spinal canal. AR
16 649. Plaintiff's treating orthopedist noted that plaintiff's
17 "neurological examination has been normal" and that his pain "is
18 not sharp all the time and for this reason we have suggested that
19 nothing be done about it at present." Id. Plaintiff did not seek
20 further treatment for his spine until October 22, 2002, more than
21 three and a half years later. AR 648. Plaintiff's fourth back
22 surgery took place nearly eighteen months after his date last
23 insured. AR 638-39. There is no evidence that plaintiff received
24 pain medication for his spinal condition during the relevant time
25 period. AR 647-49. Moreover, after the surgery to plaintiff's
26 right knee in December 2000, the treating physician noted that
27 plaintiff was "discharged home in satisfactory condition." AR 602.

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Accordingly, the court finds that the ALJ fully and fairly developed the record by properly considering the relevant evidence in making his determination.

C

Plaintiff argues that the ALJ improperly rejected plaintiff's testimony alleging disabling pain symptoms. See Doc #9 at 10; Doc #13 at 3-5. Once a claimant has established an underlying medical impairment which could be reasonably expected to produce some subjective symptoms, an ALJ must give specific, clear and convincing reasons to reject allegations of subjectively disabling symptoms to allow a reviewing court to determine whether the ALJ did so on permissible grounds. See Bunnell v Sullivan, 947 F2d 341, 345-46 (9th Cir 1991); Thomas v Barnhart, 278 F3d 947, 959-60 (9th Cir 2002). An ALJ may consider various factors in assessing the credibility of the allegedly disabling subjective symptoms. See 20 CFR § 404.1529. Such factors include: a claimant's ability to perform numerous daily activities; a failure to seek treatment; the nature, location, onset, duration, frequency, radiation, and intensity of the alleged disabling pain; and ordinary techniques of credibility evaluation. See *id*; Bunnell, 947 F2d at 346-47.

The ALJ thoroughly and specifically documented his reasons for rejecting plaintiff's allegations of subjective disabling symptoms. AR 389-96. Plaintiff's medical treatment between June 23, 1998 through September 30, 2001 was minimal. AR 393, 648-51. After his alleged onset date, plaintiff sought medical treatment for his spine on three occasions between August

1 1998 and February 1999 and did not seek treatment again until
2 October of 2002. AR 648-52. The ALJ also noted that there was no
3 evidence that plaintiff received pain medication for his spine
4 during this time period. AR 389-96, 647-49.

5 Plaintiff forcefully contends that he sought medical
6 treatment and was on pain medication; in doing so, however, he
7 ignores the relevance of both the time period in which he sought
8 medical treatment and of the conditions he sought it for. Doc #9
9 at 10-11; Doc #13 at 3-4. It is true that plaintiff did seek
10 medical treatment from February 1999 through his last date insured.
11 Plaintiff, however, sought treatment for a minor finger injury,
12 vertigo, ear congestion, blood pressure and a knee infection that
13 healed soon after treatment. AR 593-610. Although plaintiff
14 sought treatment for his spine, he did not do so until nearly
15 eighteen months after his date last insured. AR 648.

16 The medical records from plaintiff's doctor visits during
17 the relevant time period further undermine his contention that he
18 was disabled: they show that he was not taking pain medication. AR
19 593. For example, plaintiff took Keflex for a short time after his
20 right knee incision, but Keflex is an antibiotic that is unrelated
21 to the treatment of spinal conditions and does not relieve pain.
22 AR 595-98. Moreover, no medical records support plaintiff's
23 dubious assertion that he received pain medication from his
24 brother-in-law, an alleged doctor. Doc #9 at 11; AR 748. In fact,
25 plaintiff's orthopedist noted in December 2002 that plaintiff was
26 "currently off all medications." AR 647.

27 The ALJ also relied on inconsistencies in plaintiff's
28 testimony with other evidence in the record to discount plaintiff's

1 credibility. See Johnson v Shalala, 60 F3d 1428, 1434 (9th Cir
2 1995) (ALJ may use inconsistencies within cumulative record to
3 discount claimant's credibility). For example, plaintiff contends
4 that he injured his knee in December 2000 after falling because of
5 pain in his lower back. Doc #9 at 16. Plaintiff's own statements
6 and medical reports later contradicted his story. AR 393, 585. He
7 told the emergency room physician that he did not recall a
8 "precipitating traumatic event" which gave rise to his knee
9 problems; soon thereafter, plaintiff was diagnosed with a staph
10 infection. AR 393, 579, 585.

11 The ALJ also considered the activities plaintiff could
12 perform despite the extent of his alleged disabling pain. AR 393.
13 He noted that plaintiff did household chores such as cooking,
14 laundry and mowing the lawn. AR 393, 515, 761-62, 766. At least
15 four times a week, plaintiff drove fourteen miles to meet his wife
16 for lunch at her office. AR 515-16, 520. The record further shows
17 that plaintiff hunted and fished on occasion, served as a 4-H club
18 leader and raised beef cattle. AR 515, 517, 758.

19 Plaintiff correctly asserts that trivial discrepancies
20 should not be relied upon to discredit a claimant's credibility.
21 Doc #13 at 3. Nonetheless, the inconsistencies in plaintiff's
22 testimony with other evidence in the record can hardly be
23 characterized as trivial. The ALJ needs only substantial evidence
24 on which to base his conclusion and the ALJ's interpretation of
25 plaintiff's testimony need not be the only reasonable one. See
26 Rollins v Massanari, 261 F3d 853, 857 (9th Cir 2001). The court
27 disagrees with plaintiff's assertion that "the only conclusion one
28 can come to is * * * favorable to [plaintiff]," Doc #13 at 5, and

1 accordingly finds that the ALJ properly made specific and
2 convincing findings in rejecting plaintiff's reports of disabling
3 pain symptoms.

4
5 D

6 Plaintiff argues that the ALJ improperly failed to
7 consider lay witness evidence in the form of statements made by
8 plaintiff's sister and parents. He perfunctorily cites Howard v
9 Barnhart, 341 F3d 1006, 1012 (9th Cir 2003), and Vincent v Heckler,
10 739 F2d 1393, 1395 (9th Cir 1984) for the proposition that "under
11 prevailing case law," not addressing statements by plaintiff's
12 sister and parents was harmful error. This argument is without
13 merit.

14 The ALJ is not required to address every piece of
15 evidence so long as the ALJ's decision is supported by substantial
16 evidence. See Howard, 341 F3d at 1012; Vincent, 739 F2d at 1395.
17 While the ALJ did not address the written statements made by
18 plaintiff's sister and parents, AR 552, 555, the unaddressed
19 statements did not substantiate any of plaintiff's claims during
20 the relevant time period and the limited insight they appear to
21 offer is, at best, cumulative. Accordingly, because there was
22 substantial evidence to support the ALJ's decision, the court
23 concludes that not addressing all the lay witness testimony was not
24 error. See 20 CFR §§ 404.1513(d)(4) & (e); see also Burch v
25 Barnhart, 400 F3d 676, 679 (9th Cir 2005) (recognizing the concept
26 of harmless error within the Social Security context).

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E

Plaintiff contests the ALJ's residual functional capacity (RFC) finding and asserts that the ALJ improperly determined that plaintiff could perform other work. Doc #9 at 16-17.

As noted above, the final decision denying plaintiff disability benefits on June 23, 1998, together with the judgment in Bartlett v Apfel, #C 00-0254 MJJ affirming that decision, created a presumption of non-disability. See 42 USC § 405(g)-(h); Miller v Heckler, 770 F2d 845, 848 (9th Cir 1985). A claimant's RFC describes the most an individual can do despite his or her limitations. 20 CFR § 404.1545. In the prior decision, the ALJ determined that plaintiff retained the RFC for "light work" as defined by 20 CFR 404.1567(b), with alternate sitting and standing and without frequent bending or stooping. AR 392. Accordingly, the burden continued to rest with plaintiff to demonstrate "changed circumstances" since the date of that decision. See Booz v Secretary of Health and Human Services, 734 F2d 1378, 1379 (9th Cir 1983). Because the court has already determined that the record contains substantial evidence from which the ALJ could reasonably conclude that plaintiff's condition had not deteriorated between June 23, 1998 through September 30, 2001, the ALJ's RFC finding is supported by substantial evidence. AR 393-95.

Since plaintiff did not meet his burden, the ALJ could have made a determination of non-disability without having to show that other jobs exist in the national economy which plaintiff could perform. See Booz, 734 F2d at 1379-80. Nonetheless, the ALJ presented a hypothetical to the VE correctly summarizing plaintiff's limitations and the VE testified that plaintiff was


1 still capable of performing other jobs in the light work category,
2 including a cashier and a survey worker. AR 393-95, 786-87.

4 IV

5 The ALJ's decision was supported by substantial evidence
6 in the record as a whole and was based on correct legal principles.
7 For the foregoing reasons, the court affirms the ALJ's decision to
8 deny benefits. Accordingly, the court DENIES plaintiff's motion
9 for summary judgment (Doc #9) and GRANTS defendant's motion for
10 summary judgment (Doc #10).

11 The clerk is directed to enter judgment in favor of the
12 defendant and against plaintiff, to close the file and to terminate
13 all pending motions.

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16 IT IS SO ORDERED.

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20 VAUGHN R WALKER
21 United States District Judge
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